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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 450.

UNITED STATES OF AMERICA,

Petitioner,

—against—

FARR SUGAR CORPORATION, AMERICAN SPIRITS, INC., *et al.*,

Respondents.

BRIEF FOR RESPONDENTS FARR SUGAR CORPORATION AND AMERICAN SPIRITS, INC., *ET AL.*, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Opinions Below.

The opinion of the District Court for the Southern District of New York (R. 101) is reported at 90 F. Supp. 836. The opinion of the Court of Appeals for the Second Circuit (R. 135) is reported at 191 F. (2d) 370.

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit was entered on August 31, 1951. The Petition invokes the jurisdiction of this Court under 28 U. S. C. 1254(1).

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[1] The incorporation in the caption of the Petition of the names of Atlantic Mutual Insurance Company, *et al.*, as respondents is an error. Neither that company, nor any insurance company, has been proceeded against by the United States of America in this litigation or is a party with respect to the question in dispute.

The Question Presented.

The question presented is, we submit, the reverse of the question as stated in the Petition. The question presented is

> "Can any change in public policy be found in the Harter Act of 1893, or the Carriage of Goods by Sea Act of 1936, which would justify and validate the Both-to-Blame clause, which clause concededly violates the public policy of this country existing prior to those Acts?"

Statement.

The statement in the Petition should be supplemented in two particulars:

(a) It was also stipulated that in the carriage of the cargo in question, the War Shipping Administration was engaged as a common carrier in the commercial carriage of merchandise by sea for hire (R. 77).

(b) The recovery of the cargo losses is by the cargo insurers under subrogated rights (R. 74-5, 119-120). The petition for indemnity is against the individual cargo owners (R. 40, 76, 120).

Statutes Involved.

The pertinent portions of the Harter Act (Act of February 13, 1893, 27 Stat. 445, 46 U. S. C., Sections 190-195) and of the Carriage of Goods by Sea Act (Act of April 16, 1936, 49 Stat. 1207, 46 U. S. C., Sections 1300 *et seq.*) are set forth in the Appendix to this brief, *infra*, pp. 13 *et seq.*

Reasons for Denying the Writ.

The decision of the Court of Appeals invalidating the Both-to-Blame clause does not disturb an established carrier cargo-owner relationship but, on the contrary, leaves that relationship as it has heretofore existed since the enactment of the Harter Act, 1893, and before.

The Both-to-Blame clause, while directed at securing relief for the carrier from the effects of this Court's decision in *The Chattahoochee,* 173 U. S. 540 (1899), through an attempted transfer to the innocent cargo owner of a substantial part of the burden of the negligent carrier's liability towards another shipowner for collision damages, was not incorporated in ocean bills of lading prior to 1935, nor used generally until 1937 (R. 137, fn. 1, Petition, 5, fn. 1a).

The validity of the Both-to-Blame clause has never been admitted by the cargo interests. It has been continuously resisted and the clause has never been enforced by any court.

The decision below is therefore of importance only to carriers who seek to disturb violently their relationship with cargo owners through validation of this clause which would deprive innocent cargo owners of a substantial part of the benefit of their immemorial right to recover their damages *in solido* against a negligent non-carrier, and force them to turn over a share of such recoveries to the negligent carrier.

The right of the innocent cargo owner to recover its damages in full from a negligent third party, irre-

spective of the possible contributory negligence of any other person, was established beyond reach of any further attack in the decision of this Court in *The Atlas,* 93 U. S. 302 (1876). In that case this Court rejected the English rule of *The Milan,* Lush. Adm. 388 (1861), limiting cargo recoveries against one of two joint tort feasors to a moiety (one-half) and held that no extension of the admiralty rule of division of damages between mutual wrongdoers can be sanctioned so as to do an injustice to the innocent owner of cargo (p. 318).[2]

In *The Chattahoochee,* this right of the cargo owners was again upheld and this Court further held

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[2] The English moiety rule of *The Milan* became fixed in English law as a result of the Judicature Act of 1873, which made the rules enforced in the Admiralty courts, as of the date of the enactment, the law of England in all courts in maritime cases. That rule, although fixed by the statute, has nevertheless been severely criticized by English Courts and text writers as being not logically satisfactory, historically unsound, and working positive injustice. *Marsden on Marine Collisions* (9th ed., 1934) 136; *Roscoe on Damages in Marine Collisions* (3d ed.) 20, 21; *The Drumlanrig* (1910), Prob. 249, at 262 and 269; *Stoomvaart, etc.* v. *P. & O. Navigation Co.* (1882), 7 App. Cas. 795, 819.

Nevertheless, the English proportionate fault rule, *i. e.,* liability proportionate to degree of fault, was incorporated (as to property interests only) in the Brussels Collision Convention, 1910, which has been adopted by a considerable number of countries. That Convention has never been ratified by this country, and numerous attempts at ratification have been successfully opposed by cargo interests and others. The case against that Convention from this country's point of view is stated in the Report of John M. Woolsey (shipowners' counsel, and later United States District Judge) to the Assistant Secretary of Commerce (1928), filed in opposition to ratification of the Convention. See Hearings of the Sub-committee on Foreign Relations of the United States Senate, 75th Congress, 3rd Sess., relating to the Collision Convention of 1910, p. 341 (see R. 139, fn. 3).

The Both-to-Blame clause is a conceded attempt by carriers to obtain from cargo owners by forced contract the equivalent of the benefits of the rejected Collision Convention. See Petition, 6, fn. 2 and 9, fn. 6, subd. 4.

that the Harter Act did not affect the right of the non-carrier to include, as part of its claim for collision damages, the amount of its liability to cargo on the other vessel for the purpose of division of damages between negligent shipowners under the admiralty rule. This Court in that case specifically rejected the argument (p. 552) that to hold the carrier liable in this indirect manner for a part of the damages suffered by cargo would be to disregard and nullify the Harter Act.[3]

The petitioner's argument in support of the Both-to-Blame clause is that the imposition of this "indirect liability for cargo damage" is contrary to the purpose of the Harter Act, but, since it has been established from the time of the decision in *The Chattahoochee* that the Harter Act has nothing to do with that liability, that argument is not supportable.[4]

It is correctly stated in the Petition (8, also 9, fn. 6, subd. 3) that the recovery by the non-carrier is for "collision damages" in which it is allowed

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[3] The correctness of the decision in *The Chattahoochee*, is not here in question, for it is under that rule, applicable here by stipulation (R. 75-76, 120), that the shipowner's liability for which indemnity is sought under the Both-to-Blame clause arises. (See R. 144.) The principle of the decision in *The Chattahoochee* was, however, approved and followed by this Court in *Aktieselskabet Cuzco* v. *The Sucarseco,* 294 U. S. 394, 400-401. It was held equally applicable to cases arising prior to the Harter Act, *Erie R. R. Co.* v. *Erie & Western Trans. Co.,* 204 U. S. 220, where it was held that defenses under bill of lading provisions open to the carrier against a claim by the cargo owner would not avail the carrier in respect to the claim of another vessel owner for collision damages consisting of that vessel owner's payments to the cargo owners.

[4] The effect of the doctrine of *The Chattahoochee* is that the sum of the changes in the shipowner's duties in the Harter Act was not enough to justify extending his release beyond the direct claims of shippers. *American Mutual Liability Ins. Co.* v. *Matthews* (C. A. 2), 182 F. (2d) 322, 326, per Learned Hand, *C. J.*, and see R. 145.

to include the amount of its required payments to cargo or to other innocent persons. The non-carrier recovers its payments to cargo, not as cargo damage, but as a part of its own damages flowing directly from the other vessel's tort, *i. e.*, from the breach of the carrying vessel owner's duty of safe navigation owed to the non-carrying vessel (R. 143). *Erie R. R. Co.* v. *Erie & Western Trans. Co.*, 204 U. S. 220, 226; *Aktieselskabet Cuzco* v. *The Sucarseco*, 294 U. S. 394, 400-401; *American Mutual Liability Insurance Co.* v. *Matthews, et al.* (C. A. 2), 182 F. (2d) 322, 324.

Since the liability for which indemnity is sought is not a liability for damage to cargo resulting from the shipowner's negligence towards the cargo owner, but a liability to another vessel owner, resulting from negligence toward that vessel owner, for collision damages of which that vessel owner's liability to the cargo owner is only an incidental part, it is clear, we submit, that neither the Harter Act, nor the Carriage of Goods by Sea Act, can justify an attempt by the carrier to impose on the innocent cargo owner an obligation to indemnify the carrier against that liability.[5]

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[5] Once this distinction is clearly grasped, the suggestion that the result of the decision in *The Chattahoochee* is anomalous disappears. The liability arising between negligent vessel owners as the result of a collision is a single indivisible liability on the part of that one having the lesser claim to pay the other one-half the difference between the respective losses sustained, *The North Star*, 106 U. S. 17, 20. The carrier's liability is no different when cargo is involved. Cargo recovers its damage from an independent tort feasor who is liable *in solido*. The carrier is liable because that independent tort feasor has sought a division of damages and proved him also negligent. With this the cargo owner has nothing to do. A division of damages between the non-carrier tort feasor and another negligent party will not be permitted to affect adversely an innocent owner of cargo, *The Atlas, supra*, 93 U. S. 302, 318. The validation of the Both-to-Blame clause would lead to equally "anomalous" results and greatly complicate collision litigation (R. 138 and fn. 2 on that page).

The Acts may impose on the cargo owner the risk of the carrier's negligence toward him (Petition, 11). They do not impose on the innocent cargo owner the carrier's risk of liability to another shipowner for his negligence toward that shipowner and for collision damages suffered by that other shipowner as a result of a collision. Yet it is against this latter liability that the Both-to-Blame clause seeks indemnity from the cargo owner.

The clause is in no sense a "consensual agreement" (Petition, 10, 15). It is a clause which ocean carriers by combined action have sought to force on cargo owners as a condition of the carriage of their goods. The Petition refers to the clause as a standard part of ocean bills of lading today (Petition, 7) and sets forth the fact that it has been adopted by the North Atlantic Freight Conference (5, fn. 1a). In the court below it was stated by shipowner's counsel that the clause is contained in practically all bills of lading issued by steamship companies doing business to and from the United States today (R. 139).

As the Court of Appeals pointed out, the lack of equality of bargaining power between shippers and carriers has long been recognized in our law, and unreasonable stipulations have not been allowed to stand (R. 139). The shipper has no choice but to accept the bill of lading tendered by the carrier or to abandon his business. *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 441.

The Both-to-Blame clause is unreasonable on its face. It would deprive the cargo owner of a substantial part of his long-established rights against third parties as no statute has done, and force him to turn over those benefits to the negligent shipowner. No

conceivable benefit to the cargo owner can result. On the contrary, the shipowner, having been relieved of liability for negligence to the owner of his cargo, desires now to be indemnified *pro tanto* for his liability for negligence to another shipowner. Thus would the incentive to due care on the part of the shipowner be whittled away.

Any consent to such a clause is presumed to be lacking. *Inman* v. *South Carolina Railway,* 129 U. S. 128, 139; *The Kensington,* 183 U. S. 263, 268.

The Jason clause, referred to in the Petition (p. 14), on the contrary, gives reciprocal rights. Under it the shipowner and the cargo owner both contribute in general average, *i. e.*, to those expenses and sacrifices incurred by the voluntary act of the master, after a disaster, as the agent of both, to save all interests from a greater loss. They contribute only *pro rata* according to benefits actually received. The Jason clause merely invests the master with authority to act directly for the cargo in a situation of common peril. *Aktieselskabet Cuzco* v. *The Sucarseco,* 294 U. S. 394, 402-403. It is not a diminution of the rights cargo would otherwise have. *The Toluma* (C. A. 2), 72 F. (2d) 690, 693, affirmed *sub nomine, Aktieselskabet Cuzco* v. *The Sucarseco,* 294 U. S. 394, *supra.*

The Jason clause, unlike the Both-to-Blame clause, does not call for an indemnity, but only for contribution to expenses incurred for joint account. Any resemblance between these clauses is superficial only, as pointed out by the Court of Appeals (R. 147).

The Both-to-Blame clause violates both the purpose and the specific provisions of the Carriage of Goods by Sea Act of 1936.

The purpose of the Act was to define by law the rights and liabilities of ocean carriers and shippers in foreign commerce, to relieve shippers, bankers and others from the necessity of examining closely long and complicated bills of lading (see R. 139 and R. 52-67) to ascertain their rights and responsibilities, and to simplify and establish uniformity of ocean bills of lading. House Report 2218, 74th Cong., 2nd Sess., on S. 1152, pp. 1, 6, 7; Senate Report 742, 74th Cong., 1st Sess., on S. 1152, p. 4.

The Both-to-Blame clause would destroy international uniformity. It would have effect principally in suits in the United States (Petition, 6, fn. 2). If validated, it would place on cargo owners in our courts a burden of liability and indemnity found practically nowhere else in the world. It would place on them a liability quite outside the provisions of the Act and not authorized thereby. It would require any holder in due course of a bill of lading in international commerce to inspect and consider, not the provisions of the Act as intended by Congress, but the peculiar provisions of the bill of lading, to determine his rights and responsibilities, and to protect himself against this unusual liability as best he may.

The Carriage of Goods by Sea Act, §6, permits special agreements as to the rights and immunities of the carrier only when no bill of lading has been issued and when the agreement is incorporated in a non-negotiable receipt, so marked, and provided such agreement does not apply to ordinary commercial shipments made in the ordinary course of trade.

Section 4(3) of that Act provides specifically that the shipper shall not be liable for loss or damage sustained by the carrier arising from *any* cause without the shipper's neglect.[6] In the Petition (p. 13) it is sought to avoid the effect of this clause by describing the cargo owner's liability to indemnify the carrier as a recoupment by the carrier. But the carrier's liability to the non-carrier is to him loss or damage sustained for which the cargo owner, if the clause were upheld, would be liable to the carrier as indemnitor. Such liability is forbidden as clearly as human language can express a prohibition.[7]

Section 3(8) not only forbids any lessening of the shipowner's liability for cargo damage resulting from his negligence otherwise than as provided in the Act, but also expressly forbids any benefit of insurance *or similar clause*. The Both-to-Blame clause is an at-

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[6] The framers of this clause intended by the language chosen "to give the shipper the largest protection that could be devised for him". See Bulletin No. 57, International Maritime Committee, London Conference, October 11, 1922, p. 480, on the drafting of the Brussels Convention, 1922, adopted as the Carriage of Goods by Sea Act, 1936, with minor changes not here relevant.

[7] At the hearings before the Senate and House Committees on the Carriage of Goods by Sea Act, all cargo representatives made it clear that in their opinion the Both-to-Blame clause, which had only recently appeared, would be invalidated by Section 4(3). One cargo representative tentatively suggested that to avoid prolonged litigation a provision be included specifically condemning the clause. The other cargo representatives were so clear that §4(3) invalidated the clause that they preferred not to support the suggestion of a specific prohibition, rather than to jeopardize or delay the passage of the Bill which was considered otherwise desirable. Accordingly, the suggestion was not pressed or adopted. This is the "rejection" referred to in the Petition (p. 13). See Hearings before Senate Committee on Commerce on S. 1152, 74th Cong., 1st Sess., pp. 51-59; Hearings before House Committee on Merchant Marine and Fisheries on S. 1152, 74th Cong., 2d Sess., pp. 49-53.

tempt by carriers to secure the benefit of the cargo owner's insurance by indirection, on the unwarranted assumption that all cargo is insured.[8] The cargo owner is himself required to stand as insurer of the carrier and can protect himself against the liability sought to be imposed only by insurance. The Both-to Blame clause is therefore a forbidden compulsory insurance clause, *Phoenix Ins. Co.* v. *Erie and Western Transportation Co.*, 117 U. S. 312, 323; *Inman* v. *So. Car. Rwy.*, 129 U. S. 128, 139. The carrier cannot obtain by indirection that for which he may not stipulate directly. *The Turret Crown* (C. C. A. 2), 297 Fed. 766, 778, cert. den. 264 U. S. 591. The Both-to-Blame clause is a benefit of insurance or similar clause and, therefore, forbidden.

The Both-to-Blame clause patently overturns settled principles of our law (R. 138). This shifting of the burden of insurance and other costs should not be left to the control and choice of the one group which is seeking to avoid the burden (R. 140, fn. 4). And certainly not when the curtailment of the cargo owner's rights sought by the clause has no direct authorization of law and has been successfully opposed by cargo interests in the halls of legislation (R. 140), *e. g.*, their successful opposition to the Brussels Collision Convention, 1910. (See fn. 2, *supra*, p. 4.) The argument that there is some desirability in the clause because it would introduce into our law conformity to the law of those countries which have adopted that Convention (Petition, 6, fn. 2) loses all

[8] The United States in this case (R. 81), and carrier shipowners generally (R. 140, fn. 4), are protected by so-called P. and I. insurance against the liability for which they seek indemnity from the innocent cargo owners by means of the Both-to-Blame clause.

force when the successful opposition to the adoption of that Convention in this country is considered? The greater the stress on this argument, the more surely it follows that any correction in the situation, anomalous or otherwise, of which the shipowner complains, if any is warranted, is for Congress rather than for the courts (R. 139).

To read into the statutes support for the Both-to-Blame clause is, indeed, to push the policy of the legislation to a point where it has definitely not gone, and is in itself legislation (R. 145).

While it might be advantageous to the cargo interests if this Court were to grant the writ and to affirm the decision of the Court of Appeals, rather than merely to deny the writ, we submit that the decision of the Court of Appeals for the Second Circuit, a court so widely experienced in the field of admiralty law and maritime relations, is so clearly correct that there is small need for this Court to review the decision below.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondents.

APPENDIX.

Harter Act, 1893.

THE HARTER ACT

27 U. S. Statutes at Large, 445. 46 U. S. Code, Sec. 190-195
[Feb. 13, 1893.]

Sec. 1. It shall not be lawful for the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect. 46 U. S. Code, Sec. 190.

Sec. 2. It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent or manager to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence, properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided. 46 U. S. Code, Sec. 191.

Sec. 3. If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner, or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent or master, be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the

thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service. 46 U. S. Code, Sec. 192.

Sec. 4. It shall be the duty of the owner or owners, master, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described. 46 U. S. Code, Sec. 193.

Sec. 5. For a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the Government of the United States. 46 U. S. Code, Sec. 194.

Sec. 6. This act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two, and forty-two hundred and eighty-three of the Revised Statutes of the United States, or any other statute defining the liability of vessels, their owners, or representatives.

Sec. 7. Sections one and four of this act shall not apply to the transportation of live animals. 46 U. S. Code, Sec. 195.

Carriage of Goods by Sea Act, 1936.

AN ACT

Relating to the carriage of goods by sea.
49 Stat. c. 229, 1207.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this Act. 46 U. S. Code, §1300.

Title I

Section 1. When used in this Act—

(a) The term "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.

(b) The term "contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

(c) The term "goods" includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

(d) The term "ship" means any vessel used for the carriage of goods by sea.

(e) The term "carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship. 46 U. S. Code, §1301.

Risks

Sec. 2. Subject to the provisions of section 6, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth. 46 U. S. Code, §1302.

Responsibilities and Liabilities

Sec. 3. (1) The carrier shall be bound, before and at the beginning of the voyage to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

(3) After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods: PROVIDED, That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

(4) Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3) (a), (b), and (c), of this section: PROVIDED, That nothing in this Act shall be construed as repealing or limiting the application of any part of the Act, as amended, entitled "An Act relating to bills of lading in interstate and foreign commerce", approved August 29, 1916 (U. S. C., Title 49, secs. 81-124), commonly known as the "Pomerene Bills of Lading Act."

(5) The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

(6) Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: PROVIDED, That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

(7) After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a "shipped" bill of lading: PROVIDED, That if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this section be deemed to constitute a "shipped" bill of lading.

(8) Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability. 46 U. S. Code, §1303.

Rights and Immunities

Sec. 4. (1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 3. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions;

(i) Act or omission of the shipper or owner of the goods, his agent or representatives;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: PROVIDED, That nothing herein contained shall

be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and civil commotions;

(l) Savings or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(o) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

(3) The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

(4) Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this Act or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: PROVIDED, HOWEVER, That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per

customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: PROVIDED, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

(6) Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master, or agent of the carrier, has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any. 46 U. S. Code, §1304.

Surrender of Rights and Immunities and Increase of Responsibilities and Liabilities

Sec. 5. A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under this Act, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of this Act shall not be applicable to charter parties; but if bills of lading are issued in the case of a ship under a charter party, they shall comply with the terms of this Act. Nothing in this Act shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average. 46 U. S. Code, §1305.

Special Conditions

Sec. 6. Notwithstanding the provisions of the preceding sections, a carrier, master or agent of the carrier, and a shipper shall, in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligations as to seaworthiness (so far as the stipulation regarding seaworthiness is not contrary to public policy), or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea: PROVIDED, That in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a nonnegotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect: PROVIDED, That this section shall not apply to ordinary commercial shipments made in the ordinary course of trade but only to other shipments where the character or condition of the property to be carried or the circumstances, terms, and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement. 46 U. S. Code, §1306.

Sec. 7. Nothing contained in this Act shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea. 46 U. S. Code, §1307.

Sec. 8. The provisions of this Act shall not affect the rights and obligations of the carrier under the provisions of the Shipping Act, 1916, or under the provisions of sections 4281 to 4289, inclusive, of the Revised Statutes of the United States, or of any amendments thereto; or under the provisions of any other enactment for the time being in force relating to the limitation of the liability of the owners of seagoing vessels. 46 U. S. Code, §1308.

TITLE II

Section 9. Nothing contained in this Act shall be construed as permitting a common carrier by water to discriminate between competing shippers similarly placed in time and circumstances, either (a) with respect to their right to demand and receive bills of lading subject to the provisions of this Act; or (b) when issuing such bills of lading, either in the surrender of any of the carrier's rights and immunities or in the increase of any of the carrier's responsibilities and liabilities pursuant to section 5, title I, of this Act; or (c) in any other way prohibited by the Shipping Act, 1916, as amended. 46 U. S. Code, §1309.

Sec. 10. Section 25 of the Interstate Commerce Act is hereby amended by adding the following proviso at the end of paragraph 4 thereof: "PROVIDED, HOWEVER, That insofar as any bill of lading authorized hereunder relates to the carriage of goods by sea, such bill of lading shall be subject to the provisions of the Carriage of Goods by Sea Act." Repealed by Transportation Act, 1940, 54 Stat. 929.

Sec. 11. Where under the customs of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper, and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in this Act, the bill of lading shall not be deemed to be prima facie evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to

have been guaranteed by the shipper. 46 U. S. Code, §1310.

Sec. 12. Nothing in this Act shall be construed as superseding any part of the Act entitled "An Act relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property", approved February 13, 1893, or of any other law which would be applicable in the absence of this Act, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded, on or after the time they are discharged from the ship. 46 U. S. Code, §1311.

Sec. 13. This Act shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. As used in this Act the term "United States" includes its districts, territories and possessions: PROVIDED, HOWEVER, That the Philippine Legislature may by law exclude its application to transportation to or from ports of the Philippine Islands. The term "foreign trade" means the transportation of goods between the ports of the United States and ports of foreign countries. Nothing in this Act shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possessions: PROVIDED, HOWEVER, That any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to the provisions of this Act, shall be subjected hereto as fully as if subject hereto by the express provisions of this Act: PROVIDED, FURTHER, that every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this Act. 46 U. S. Code, §1312.

Sec. 14. Upon the certification of the Secretary of Commerce that the foreign commerce of the United States in its competition with that of foreign nations is preju-

diced by the provisions, or any of them, of title I of this Act, or by the laws of any foreign country or countries relating to the carriage of goods by sea, the President of the United States may, from time to time, by proclamation, suspend any or all provisions of title I of this Act for such periods of time or indefinitely as may be designated in the proclamation. The President may at any time rescind such suspension of title I hereof, and any provisions thereof which may have been suspended shall thereby be reinstated and again apply to contracts thereafter made for the carriage of goods by sea. Any proclamation of suspension or rescission of any such suspension shall take effect on a date named therein, which date shall be not less than ten days from the issue of the proclamation.

Any contract for the carriage of goods by sea, subject to the provisions of this Act, effective during any period when title I hereof, or any part thereof, is suspended, shall be subject to all provisions of law now or hereafter applicable to that part of title I which may have thus been suspended. 46 U. S. Code, §1313.

Sec. 15. This Act shall take effect ninety days after the date of its approval; but nothing in this Act shall apply during a period not to exceed one year following its approval to any contract for the carriage of goods by sea, made before the date on which this Act is approved, nor to any bill of lading or similar document of title issued, whether before or after such date of approval in pursuance of any such contract as aforesaid. 46 U. S. Code, §1314.

Sec. 16. This Act may be cited as the "Carriage of Goods by Sea Act." 46 U. S. Code, §1315.

Approved, April 16, 1936.

Brief for Belgian Overport, S.A., M.V. *Esso*

Respondent Seas Transowner of the *Belgium*.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 450.

UNITED STATES OF AMERICA,

Petitioner,

v.

ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*, FARR SUGAR CORPORATION, AMERICAN SPIRITS, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT BELGIAN OVERSEAS TRANSPORT, S. A., OWNER OF THE MV. *ESSO BELGIUM*

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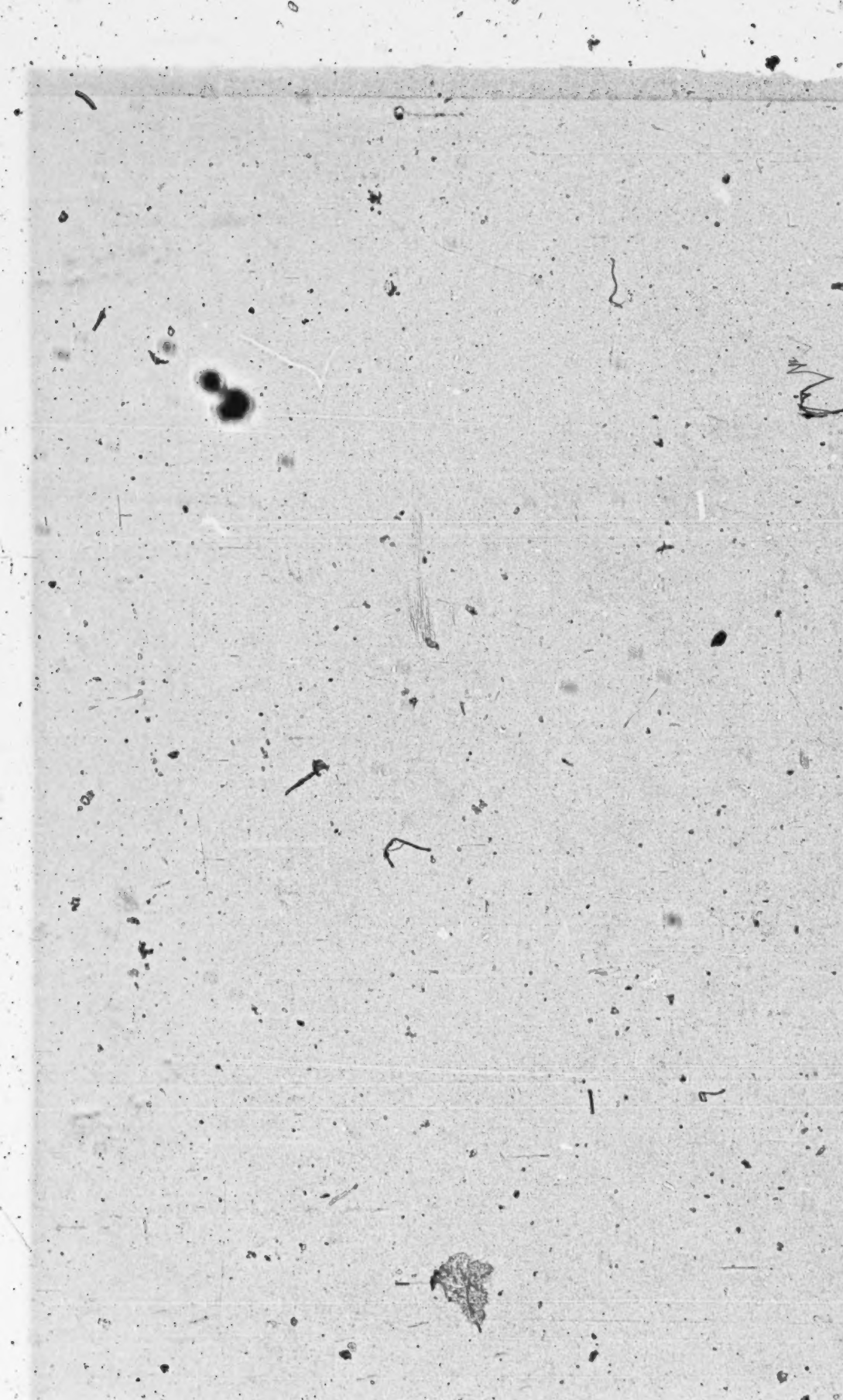

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BRIEF FOR RESPONDENT BELGIAN OVERSEAS TRANSPORT, S. A., OWNER OF THE MV. *ESSO BELGIUM*

STATEMENT.

The decree of the District Court adjudged, pursuant to the stipulation of the parties, that the collision in this case occurred because of the mutual fault of both vessels. Belgian Overseas Transport, S. A., owned and operated the MV. *Esso Belgium*, the non-carrying vessel, which collided with the SS. *Nathaniel Bacon*, the carrier of the cargo involved. No issue is presented concerning the

non-carrying vessel's direct liability to the cargo owners for this loss and the decree of the District Court so provided. The reversal by the Court of Appeals did not affect that portion of the decree (R. 148), with the result that whether or not the Both-to-Blame Clause is upheld, the respondent Belgian Overseas Transport, S. A., owner of the MV. *Esso Belgium*, remains liable to the cargo owners. None the less, its interest as well as the interests of all United States shipowners, including the U. S. Government,[1] will be seriously affected by the Court's decision in this case. Accordingly, this brief is filed by Belgian Overseas Transport, S. A., a party to this suit, in opposition to the cargo owners' contention that the Both-to-Blame Clause is invalid.

Of the maritime nations, it is only in the United States that cargo involved in a mutual fault collision may recover in full from the non-carrying ship. See p. 23, *infra*.

In this country, while a cargo owner cannot sue its carrier for cargo losses which result from negligent navigation (because both the Harter Act and the Carriage of Goods by Sea Act explicitly absolve a carrier from such liability to cargo), the cargo owner may, none the less, recover its full loss from the non-carrying vessel, and the latter may include the amount in the division of damages between it and the carrying vessel.

By this indirection, the property of the carrying vessel—which the Act exonerates—is made to pay for half of the cargo loss. See p. 36, *infra*.

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[1] The Both-to-Blame Clause is contained in practically all bills of lading issued by steamship companies doing business to and from the United States. The Clause is an essential part of all bills of lading issued by the United States of America. In July 1942, the War Shipping Administration approved a bill of lading containing this Clause and ordered its use by all agents of the United States of America (General Order 16, July 6, 1942 as amended, 46 Code of Fed. Reg. Cum. Supple. 1136, 7 Fed. Reg. 5246).

What has resulted is that the carrier is made to pay more if the navigators of the vessels were partly at fault than if either were solely at fault. The Both-to-Blame Clause is designed to avoid this undesirable anomaly of our maritime law and to implement the public policy announced in the Harter Act and in the Carriage of Goods by Sea Act. The Clause provides (R. 58):

> "If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set-off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or Carrier.
>
> The foregoing provisions shall also apply where the owners, operators or those in charge of any ship or ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect of a collision or contact."

The Clause applies only where a collision occurs as a result of "any act, neglect or default of the Master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship." That language is verbatim with the wording of §4-2a of the Carriage of Goods by Sea Act, which exonerates the carrier from liability for loss or damage occurring under those circumstances. It is in those instances alone, where the Act

itself exonerates the carrier, that the Clause operates. It applies only where the cargo owner has obtained payment for his loss, and one-half or some other portion of that payment has come from the carrier which was not liable to the cargo owner by the express terms of the Act. Under the Clause the cargo owner promises to return to the carrier whatever amount the cargo owner has received from the non-carrying ship but which the non-carrying ship has collected from the carrier.

The Fundamental Error Below.

The decision of the Court of Appeals may be summarized as follows:

Any bill of lading clause "cutting down shippers' rights" (R. 146) is void.

The Both-to-Blame Clause cuts down the shippers' rights.

Therefore the Both-to-Blame Clause is void.

That syllogism contains a fundamental error. The major premise is unsound.

With great facility, starting from an unsound major premise, the majority in the Court of Appeals reached a wrongful conclusion. Contrary to the view below, the decisions of this Court establish that a bill of lading clause is not invalid even though it cuts down the shippers' rights, provided it does not exonerate the carrier from its responsibility for negligence where such responsibility exists, or in other words, provided it does not lessen the essential duties owing to the cargo owner by the carrier.

If the major premise below had been correct, sound reasoning, as found in the decision of the District Court (R. 101), would have led to the conclusion that a Both-to-Blame Clause is valid because it in no respect diminishes

the essential duties of the carrying vessel and, indeed, it implements the statutory policy exonerating the vessel from liability to its cargo arising from negligent navigation.[2]

POINT I.

Genesis of the Both-to-Blame Clause.

Prior to the Harter Act, 46 U. S. C. A. §190 *et seq.* (1893), a carrier was directly responsible to a cargo owner for damages to cargo resulting from a collision whether the carrier was negligent or otherwise. *The Atlas*, 93 U. S. 302 (1876).

The basis of its liability in such a case was that its relation to the cargo owner was, in effect, one of an insurer (act of God and public enemy excepted), with the result that whether or not it violated any duty of its employment, it was directly liable for cargo loss. *The Delaware*, 14 Wall. 579, 597 (1871); *The Maggie Hammond*, 9 Wall. 435, 458 (1869); *The Lady Pike*, 88 U. S. 1, 14 (1874); *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397 (1888).

If a collision occurred because of the mutual fault of both vessels, the carrier was directly liable to the cargo, apart from its insurer's status, for the reason that the negligent navigation of a vessel by the carrier's servants was then a breach of one of the essential duties owing by

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[2] The only other reported opinion dealing with a Both-to-Blame Clause is the District Court's opinion in *The W. W. Bruce*, 14 F. Supp. 894, which upheld the validity of the Clause. On appeal, however, the Court of Appeals for the Second Circuit found that the Clause did not apply because the carrying vessel was unseaworthy, and its opinion stated that the ground for its decision made it unnecessary to determine whether the Clause was valid. 89 F. 2d 834 (2d Cir., 1938).

The text writers agree that the Both-to-Blame Clause is valid and enforceable under the Carriage of Goods by Sea Act. See Knauth's *The American Law of Ocean Bills of Lading* (3d ed. 1947), 175 *et seq.*, and Deutsch's *Model Ocean Bill of Lading* (1940), 224 *et seq.*

the carrier. *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 440 (1888); *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 6 How. 344 (1847); *Seller* v. *The Pacific*, Fed. Cas. 12, 644 (1861).

Stipulations by a carrier which attempted to relieve it from any of the essential duties of its employment were considered against public policy and void.

This rule brought about two situations:

(1) The carrier could effectively, by stipulation with the cargo owner, exempt itself from its legal liability which resulted where a collision occurred as a result of the sole fault of the non-carrying vessel, because such a stipulation, although it cut down the shipper's rights, did not relieve it from any of the essential duties of its employment. See *Clark* v. *Barnwell*, 12 How. 272, 280 (1851); *Propeller Niagara* v. *Cordes*, 21 How. 7, 23 (1858).

(2) The carrier could not, by stipulation, exempt itself from its legal liability which resulted where a collision occurred because of negligent navigation, whether alone or in conjunction with the negligent navigation of the other vessel, because in that event it would be relieving itself from one of the essential duties which its status as a carrier then imposed upon it. *Railroad Company* v. *Lockwood*, 17 Wall. 357 (1873); *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397 (1888).

Thus, the test in determining the validity of agreements between a cargo owner and a carrier has always been: Does the stipulation relieve the carrier from one of the essential duties of its employment? If the essential duties of the carrier are not lessened, the clause is valid and enforceable irrespective of whether the shipper's rights—which are not co-extensive with the carrier's essential duties—are diminished. That is the very rule which the Carriage of Goods

by Sea Act has adopted in determining the validity of clauses between carrier and cargo owner, namely, unless the clause lessens the carrier's liability to cargo as prescribed in the Act, it is valid. Section 3(8) of the Carriage of Goods by Sea Act, discussed pp. 30-32, *infra*.

In 1893, Congress enacted the Harter Act, 46 U. S. C. A. §190 *et seq.* Section 3 of that Act (46 U. S. C. A. §192), relieves the carrier from responsibility for damage or loss resulting from negligent navigation upon the condition that it exercises due diligence to make the vessel *in all respects* seaworthy and to properly man, equip and supply the vessel.

In 1936, Congress enacted the Carriage of Goods by Sea Act, 46 U. S. C. A. §1300 *et seq.* Section 3-1a, together with §4-2a of that Act, similarly relieves the carrier from responsibility for damage or loss resulting from negligent navigation. In addition, it removes the condition contained in the Harter Act that, before the exemption could be availed of, the carrier must exercise due diligence to make the vessel seaworthy *in all respects*. The Carriage of Goods by Sea Act, by thus removing the condition of making a vessel seaworthy *in all respects*, broadened the exemption from liability for negligent navigation contained in the Harter Act.

The decisions which declare that all contracts exonerating carriers for loss or damage arising from negligence of their servants are void, expressly state that this was the law and public policy *before the Harter Act*. See *Compania La Flecha* v. *Brauer*, 168 U. S. 104, 117 (1897); *Knott* v. *Botany Mills*, 179 U. S. 69, 71 (1900). Under existing law, while contracts relieving the carrier from its essential duties prescribed by the Acts (including liability arising from its negligence other than negligent navigation or management) continue to be void, clauses dealing with negligent navi-

gation or management may no longer be construed against public policy inasmuch as the carrier by the express terms of both Acts is no longer charged with that responsibility.

Whether the language of the Harter Act (the language of the Carriage of Goods by Sea Act is similar) relieving the carrier from all responsibilities arising from negligent navigation, was sufficient to relieve the carrier from liability for physical collision damage inflicted to another vessel was considered in *The Delaware*, 161 U. S. 459 (1895). This Court there held that the Harter Act was intended to apply solely to the relationship which existed between the carrier and cargo owners. The Harter Act, it was said, did not apply to the liability of one vessel to another.

The question then arose whether the carrier, in view of the immunity from liability for damage to cargo caused by negligent navigation granted by the Harter Act (which is similarly granted by the Carriage of Goods by Sea Act), could recover general average contributions from cargo in cases where the peril arose through the ship's negligent navigation. This Court passed upon that question in *The Irrawaddy*, 171 U. S. 187 (1897). There it was held that, notwithstanding the immunity granted by the Harter Act to a shipowner from liability for damage to cargo occasioned by the ship's negligent navigation, the shipowner nevertheless could not recover any general average contributions in such a situation from the cargo owner.

Following the decision in *The Irrawaddy*, in order to secure indemnity for general average sacrifices from cargo where there had been negligent navigation by the carrier's servants, there was inserted in bills of lading what has come to be known as the "Jason Clause".[3]

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[3] The Jason Clause read as follows:

"If the owner of the ship shall have exercised due diligence to make said ship in all respects seaworthy and

The effect of the Jason Clause is to secure to the shipowner by express contract a right recognized as proper by the public policy of the United States in both the Harter Act and the Carriage of Goods by Sea Act, but not expressly granted by those Acts.

The validity of the Jason Clause came before this Court in *The Jason*, 225 U. S. 32 (1911). The same arguments were made by cargo underwriters in the *Jason* case as are made here, namely, that a contract carrying out the full immunities recognized as a matter of public policy by the Harter Act (and which are now recognized to an even greater extent by the Carriage of Goods by Sea Act), but not expressly granted by that Act, was against public policy. At p. 54 it was said:

> "The point of the decision in *The Irrawaddy* (and as an authority the case goes no further) is, that while the Harter Act relieved the shipowner from liability for his servant's negligence, *it did not of its own force entitle him to share in a general average rendered necessary by such negligence.*" (Italics ours).

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properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or negligence of the pilot, master or crew, in the navigation or management of the ship, or from latent or other defects, or unseaworthiness of the ship, whether existing at time of shipment or at beginning of the voyage, but not discoverable by due diligence, the consignees or owners of the cargo shall not be exempted from liability for contribution in General Average, or for any special charges incurred, but with the shipowner shall contribute in General Average, and shall pay such special charges, as if such danger, damage or disaster had not resulted from such fault, negligence, latent or other defect or unseaworthiness."

After the passage of the Carriage of Goods by Sea Act which broadened the immunity from negligent navigation contained in the Harter Act, the shipowners adopted a new form of Jason clause which may be found at p. 96, *Knauth, The American Law of Ocean Bills of Lading* (3d ed. 1947).

The Court then declared that the Jason Clause, in the light of the new policy expressed in the Harter Act, is a valid agreement, saying at p. 55:

> "In our opinion, so far as the Harter Act has relieved the shipowner from responsibility for the negligence of his master and crew, it is no longer against the policy of the law for him to contract with the cargo-owners for a participation in general average contribution growing out of such negligence; and since the clause contained in the bills of lading of the *Jason's* cargo admits the shipowner to share in the general average only under circumstances where by the act he is relieved from responsibility, the provision in question is valid, and entitles him to contribution under the circumstances stated."

The Jason Clause is an agreement with the cargo owner whereby the cargo owner agrees to indemnify the shipowner for damages suffered and vessel sacrifices made to relieve a common peril resulting from negligent navigation. Such a contract is obviously one requiring the cargo owner to indemnify the shipowner against losses caused by the negligence of the shipowner's servants. That clause without question diminishes the shipper's rights because, in the absence of the clause, the shipper is under no obligation to indemnify the owner in general average. The distinction made by the Court of Appeals that under the Jason Clause the cargo owners' rights are not diminished because under that clause the cargo owners merely "waive" the defense available to them under *The Irrawaddy* rule, (R. 147), is without substance. It would seem fundamental that a bill of lading clause requiring a cargo owner to waive a defense otherwise available to him, results in the diminution of the rights of the cargo owner. But the Jason Clause has none the less been held valid because it operates "only

under circumstances where by the act he [the carrier] is relieved from responsibility . . ." (225 U. S. at p. 55).

The *Jason* case shows that under the circumstances involved there and here, a contract by a cargo owner to indemnify a shipowner against loss caused by negligent navigation of his servants is valid, because the only duty of the shipowner under both the Harter Act and the Carriage of Goods by Sea Act is to use due diligence to properly man and furnish a seaworthy vessel. He is no longer chargeable with negligent navigation of the ship by his servants. The *Jason* case upheld the validity of the Jason Clause, not on the ground of "reasonableness", nor on the ground that the shipper's rights were not diminished, but because, in so far as the Harter Act had relieved the shipowner from responsibility for negligence of his master and crew, it was no longer against the policy of the law for him to contract with cargo owners for indemnity.

After the non-carrying vessel was subjected to 100% liability to the cargo owners, the question then arose whether, on a division of the entire damages between two colliding vessels mutually at fault, the non-carrying vessel could recoup one-half of the amount which it had paid to the cargo owners.

That the non-carrying vessel could recoup from the carrying vessel one-half the cargo damage paid by it was decided in *The Chattahoochee*, 173 U. S. 540 (1899). There it was held that the Harter Act was not intended to alter the relations of the two colliding vessels to each other.

Like *The Irrawaddy*, 171 U. S. 187 (1897), *supra*, the *Chattahoochee* case involved merely the construction of the Harter Act as such.

In *The Chattahoochee* the relation between cargo owner and carrier was not considered inasmuch as the only parties before the Court were the non-carrying vessel and the car-

rier. There was thus not involved in the *Chattahoochee* decision a contractual provision between cargo owner and carrier such as there is in the case at bar. The only question before the Court in that case was whether §3 of the Harter Act, 46 U. S. C. A. §192, (the language of §4-2a of the Carriage of Goods by Sea Act is similar) *in and of itself* relieves the carrying vessel from liability to the non-carrying vessel.

The *Chattahoochee* decision recognized that if a collision is due to mutual fault in the navigation of the carrying vessel and another vessel, the Harter Act (as does the Carriage of Goods by Sea Act) furnishes a complete immunity against claims by the cargo owner against the carrier for loss or damage to cargo. Nevertheless it held that the cargo owner may sue the other vessel involved in the collision and recover its full damages from that vessel, and the other vessel may then recover, or recoup, from the carrying vessel one-half of the damages paid to the cargo on such vessel.

Thus, by indirection, in spite of the policy of total immunity announced in both the Harter Act and the Carriage of Goods by Sea Act, cargo recovers one-half of its damages from its own vessel.[4]

The reason for this anomalous situation is that, while the Harter Act and the Carriage of Goods by Sea Act announce a public policy, they are not fully self-executing. In order, therefore, to get the full benefit of the policy of the law announced therein, it is necessary for a shipowner to make appropriate contracts to secure his rights. *The Jason*, 225 U. S. 32 (1911), *supra*.

In the absence of an appropriate contract, such as the Both-to-Blame Clause, the position is that if the shipowner is solely at fault for a collision, he is not liable in any respect for damage to cargo, but, if he has the misfortune

[4] In this respect, the indirect result of the rule of *The Chattahoochee* has been severely criticized. See pp. 23-24, *infra*.

to be only partly at fault for a collision, he must respond by indirection for 50% of the damage to cargo.

The purpose of the Both-to-Blame Clause is to correct by contract this situation and to relieve a shipowner who would not be liable at all to his cargo if he were solely at fault for a collision, from the same liability, through indirection, in a case where he is only partly to blame for a collision.

POINT II.

THE CLAUSE CONTRAVENES NO GENERAL PUBLIC POLICY BECAUSE THERE IS NO ATTEMPT TO RELIEVE THE CARRIER FROM ANY OF THE PRESENT ESSENTIAL DUTIES WHICH IT OWES TO CARGO OWNERS.

It would seem evident that the majority in the Court of Appeals misinterpreted the import of *The Chattahoochee* decision. It was only because the carrying vessel could not invoke its statutory immunities in a controversy between itself and another vessel,[5] that the rule of the *Chattahoochee* resulted. That decision without question did not announce any rule of policy intended to control the relationship of cargo owner and carrying vessel for the fundamental reason that the very basis of the decision was the absence of that relationship. Under the decision of the Court of Appeals in this case, however, the indirect result of the rule of *The Chattahoochee* for all practical purposes has been incorporated into the Harter Act and the Carriage of Goods by Sea Act, with the result that the majority in the Court of Appeals erroneously concluded that a contractual clause modifying the effects of the *Chattahoochee* decision violates the policy of those Acts.

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[5] In that case this Court expressly declared (173 U. S. at 555): "* * * the relations of the two colliding vessels to each other remain unaffected by this Act, notwithstanding one or both of such vessels be laden with a cargo."

The Court of Appeals obviously lost sight of the fact that the Carriage of Goods by Sea Act continues to govern the relationship of cargo and the carrier, even though a collision occurs with another ship. The fact that the Act does not affect in any way the rights or responsibilities of the non-carrying ship does not put an end to or change the rights and responsibilities of the cargo and the carrier *inter se*. Therefore, in considering the validity of a contract which relieves the carrier from paying indirectly for cargo damage resulting from negligent navigation, it is only necessary to look to the Carriage of Goods by Sea Act to determine whether there is anything in that Act which forbids the contract or whether, on the contrary, the contract does not clearly implement the public policy laid down by the Act but not authorized specifically in so many words.

Moreover, the Court of Appeals was in error in its holding that the indirect result of the rule of *The Chattahoochee* must itself be accepted as the public policy of this country. Based on that false premise, the Court of Appeals ruled that the Clause was void because it necessarily violated this supposed public policy announced by the *Chattahoochee* decision. But the majority in the Court of Appeals ignored the distinction between case law declaring legal principles affecting the relationship between parties in the absence of a contract, and case law which defines the limitations within which the parties may contract to modify the effects of those legal principles.

All case law may be said to express a "policy" only in the limited sense that, in the absence of a contract, the rules announced will control. But that "policy" necessarily is not the "public policy" which may vitiate contracts entered into by the parties. If the latter were true, then it would be impossible under any circumstance for parties to modify, by contract, any result produced by a legal principle. Of

course, *The Jason*, 225 U. S. 32 (1911), *supra* demolishes any contention that the carrier and cargo owners may not by contract overcome case law as such, because in *The Jason* this Court permitted the parties to overcome the effects of the principle laid down in *The Irrawaddy*, 171 U. S. 187 (1897). Indeed, there is no decision which has ever prevented a carrier from contracting as he pleases with a cargo owner, *provided the essential duties owed to the cargo owner by the carrier are not reduced by the contract.* The latter proviso is the sole extent to which the cargo owner and carrier are restricted, and beyond which public policy will be deemed violated.

Obviously, case law which defines consequences imposed by law is to be distinguished from case law which defines the limits within which parties may agree to vary the effects produced by those legal principles. The first, which includes the indirect result of the rule of *The Chattahoochee*, merely expresses what the Courts will hold applicable in the absence of a contract; the second, which includes *Railroad Company* v. *Lockwood*, 17 Wall. 357 (1873), *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397 (1888), and *The Jason*, 225 U. S. 32 (1911), declares under what circumstances a contractual variation of those legal principles may exceed public policy, viz., that it may be deemed to offend public policy only if the carrier attempts to relieve itself of an essential duty of its employment. It is the latter group of cases which control in determining whether the Both-to-Blame Clause offends public policy. "The existence of the rule of public policy, not the ultimate causes upon which it may depend, is the criterion." *The Kensington*, 183 U. S. 263 at p. 270 (1902).

The validity of a bill of lading clause does not depend upon whether the clause reduces the *rights* of the shipper but upon whether the clause reduces the *essential duties* of

the carrier. A bill of lading clause under which a shipper assumes an undertaking, necessarily reduces the rights or increases the burdens of the shipper because, without the clause, the shipper would have been under no obligation to perform the undertaking assumed. The decision of the Court of Appeals in this case, however, would make all undertakings of the shipper under bill of lading clauses automatically invalid. Obviously, however, this is not the law and, indeed, the Court of Appeals recognized that the Carriage of Goods by Sea Act "does not outlaw all contracts between shipper and carrier" (R. 147). The majority in the Court of Appeals repudiated the Clause, not because it conflicted with any specific provision of the Carriage of Goods by Sea Act, but on the erroneous ground that, because the Clause as such diminished the rights of the cargo owner, it violated the supposed "old prohibition against contracts cutting down shippers' rights" (R. 146). But it has long been established that bill of lading clauses which cut down shippers' rights are not invalid, provided they do not diminish the essential duties which the carrying vessel owes to the shipper. The essential duties owing by the carrier to the shipper manifestly are not co-extensive with the rights of the shipper. The principle on which the doctrine that certain stipulations by a carrier violate public policy has not been that the stipulation reduces the rights of the shipper, but the principle is, and always has been, that the stipulation reduces the essential duties owing to the shipper by the carrier.

That this is the rationale of the rule has been often stated by this Court. *Railroad Company* v. *Lockwood*, 17 Wall. 357, 378 (1873); *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 440-441 (1888).

In the *Liverpool* case, it was said at p. 441:

> "But the law does not allow a public carrier to abandon altogether his obligations to the public, and

to stipulate for exemptions which are unreasonable and improper, amounting to an abnegation of the *essential duties* of his employment." (Italics ours).

The *Liverpool* case makes clear that because the carrier, prior to the Harter Act, was responsible for negligent navigation, any stipulation which relieved it from that responsibility was one amounting to "an abnegation of the essential duties of his employment" and was, therefore, against public policy.

That is the very rule which the Carriage of Goods by Sea Act has adopted in determining the validity of clauses between carrier and cargo owner, namely, unless the clause lessens the carrier's liability to cargo as prescribed by the Act, it is valid. Section 3(8) of the Carriage of Goods by Sea Act, discussed pp. 30-32, *infra*.

Indeed, under the decisions prior to the Harter Act whereunder the cargo owner had the legal right to recover his full loss from the carrying vessel when a collision occurred as a result of the sole fault of the non-carrying vessel, the courts uniformly recognized a bill of lading clause which cut down this shipper's right by exempting the carrier from legal liability under such circumstances. Despite the fact that the clause diminished the shipper's legal rights against the carrier, such a clause was sustained because it did not relieve the carrier from any of the essential duties of its employment. See *Clark* v. *Barnwell*, 12 How. 272, 280 (1851); *Propeller Niagara* v. *Cordes*, 21 How. 7, 23 (1858).

In so far as Congress has declared that the carrier is no longer chargeable with the negligent acts of navigation of its servants, any contract by the carrier affecting cargo damage with respect to negligent navigation cannot be held to violate public policy. That Congress clearly intended a change in the standard of duties to which the courts must

conform in their decisions, was unequivocally stated in *The Irrawaddy*, 171 U. S. 187 (1897), at p. 193:

> "Although the foundation of the rule that forbade ship owners to contract for exemption from liability for negligence in their agents and employés, was in the decisions of the courts that such contracts were against public policy, *it was nevertheless competent for Congress to make a change in the standard of duty, and it is plainly the duty of the courts to conform in their decisions to the policy so declared.* * * * The act in question does, undoubtedly, modify the public policy as previously declared by the courts, * * *." (Italics ours).

In *New York & Cuba Mail S. S. Co.* v. *Ansonia Clock Co.*, 139 Fed. 894 (S. D. N. Y., 1905), the District Court decided that the Jason Clause was invalid, relying on the same arguments which are made here by the cargo owners.

This Court, in *The Jason*, 225 U. S. 32 (1911), however, expressly overruled that decision. At p. 52, the Court said:

> "The latter view was adopted by the District Court in *New York & Cuba Mail S.S. Co.* v. *Ansonia Clock Co.*, 139 Fed. Rep. 894, where a clause identical with the one now under consideration was held invalid. This decision was apparently followed, although not cited, by the same court (162 Fed. Rep. 56), and by the Circuit Court of Appeals (178 Fed. Rep. 414, 416), in the case now under review. In reaching this result the courts below have, as we think, misconceived the effect of the language used by Mr. Justice Shiras, speaking for this court, in *The Irrawaddy*, and have given to that decision an import quite beyond its legitimate scope. In that case there was no agreement between shipowner and cargo-owner respecting general average, *nor respecting the consequences of a stranding or other peril that*

might result from the negligence of the master or crew of the vessel." (Italics ours).

We have shown that the Jason Clause is an agreement with the cargo owner whereby the cargo owner agrees to indemnify the shipowner for damages suffered and vessel sacrifices made to relieve the common peril resulting from negligent navigation. Such a contract is obviously one requiring the cargo owner to indemnify the shipowner against losses caused by the negligence of the shipowner's servants. The *Jason* case, 225 U. S. 32 (1911), *supra*, shows that under the circumstances involved there and here, a contract to indemnify a shipowner against losses caused by negligent navigation of his servants is valid, because the only duty of the shipowner under both the Harter Act and the Carriage of Goods by Sea Act is to use due diligence to properly man and furnish a seaworthy vessel. He is no longer chargeable with negligent navigation of the ship by his servants. This is aptly stated in *The Maria*, 15 F. Supp. 745 (S. D. N. Y., 1936) at p. 750:

> "Prior to the passage of the Harter Act, February 13, 1893, 46 U. S. C. A. §190, *et seq.*, the vessel owner could not secure contributions from cargo owners toward his own expenses and sacrifices in connection with a casualty resulting from the negligence of the vessel owner's employees, but he may now, under that act, by contractual provisions, secure contributions *to the extent that section 3 permits a vessel owner to escape liability for damages to cargo resulting from such.*" (Italics ours).

We submit that the Both-to-Blame Clause, which holds the carrier to the fullest measure of duty imposed upon it by law, which implements the policy of the Harter Act and the Carriage of Goods by Sea Act by relieving the carrier

from indirect liability in circumstances where the Acts relieve it from direct liability, which corrects an anomalous situation that has been the subject of severe criticism, and which brings the law of this country into closer accord with the law of the rest of the civilized world, cannot be deemed to violate public policy or be held unreasonable.

POINT III.

The Acts express no policy which conflicts with the Both-to-Blame Clause.

Both the Harter Act and the Carriage of Goods by Sea Act declare a broad public policy with respect to the relations of a vessel and its cargo. That public policy, expressed in the clearest language, is that the shipowner is not to be responsible to its cargo for loss or damage caused by negligent navigation. That risk under the express terms of the Acts is to be borne by cargo.

Both the Harter Act and the Carriage of Goods by Sea Act provide that certain clauses, of which the Both-to-Blame Clause is not one, are illegal. Congress, when asked specifically to declare the Both-to-Blame Clause illegal, declined to do so. See p. 27, *infra*.

To suggest that it requires an Act of Congress specifically authorizing the Both-to-Blame Clause to make it legal, requires a finding that, even if a clause is clearly within the policy declared by Congress, the parties cannot contract unless the particular contract has been specifically authorized in so many words.

Congress laid down the broad policy of complete exemption to the shipowner for cargo damage caused by negligent navigation. The Both-to-Blame Clause is clearly within the frontiers of that policy.

Thus the question comes down flatly to whether the Both-to-Blame Clause is within the broad policy laid down by Congress and hence is legal under the principles of *The Jason*, 225 U. S. 32, *supra*.

The statement of the majority in the Court of Appeals (R. 146-147) "* * * that Congress meant to grant the carriers only whatever benefits were explicitly set out in the legislation" is justified only in so far as it relates to benefits which the carrier obtains as a matter of law and not by agreement. In this respect, the Court of Appeals recognized that the Act does not outlaw all contracts between shipper and carrier (R. 147). Obviously, Congress did not intend that the Act influence the whole field formerly open to the right of contract[6]. True, the parties may not make a contract nullifying any duty imposed by the Act upon the carrier[7]. Other than this, however, they may contract, and with respect to many subjects, they do so. Bills of lading contain such contract provisions as the carrier's "liberties" clauses, the Jason Clause, and clauses dealing with freight, demurrage, lien, transshipment and other subjects.

Indeed, the Hague Rules, from which our Carriage of Goods by Sea Act stems, are entitled "International Convention for the Unification of *Certain Rules* relating to Bills of Lading" (Italics ours).

That the Act was not intended to be a closed code of law was clearly indicated by Congress, for in its report

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[6] See Knauth "The American Law of Ocean Bills of Lading", (3d ed. 1947) at p. 121: "But it is plain that they are not a complete or closed code of law on the topic. The needs of world-wide commerce continue to demand a flexible document; and those details upon which agreement was not reached, and as to which there is no legislative expression, continue to be subjects of free contract adjustment between the interested parties."

[7] See pp. 30-32, *infra*.

the Senate Committee on Commerce said (Senate Report No. 742, 74th Cong. 1st Sess., dated May 13, 1935, at p. 4):

> "It also will accomplish real uniformity and agreement with many other nations as to the text of *those clauses* of ocean bills of lading *with which the bill deals.*" (Italics ours).[8]

In the Minutes of Evidence Taken before The British Joint Select Committee on the Carriage of Goods by Sea Act, July 3, 1923, at p. 128, Col. 1, Sir Norman Hill stated:

> "The bills of lading used may incorporate any additional terms that may be agreed to between the parties provided the specified minimum rights are not infringed."

It seems clear, therefore, that once the carrier meets its essential duties to the cargo owner as provided by the Act, it may contract as to any other matter. This was demonstrated beyond question by the decision of *The Campfire*, 156 F. 2d 603 (2d Cir., 1946). It was there held that the Act does not prohibit or constrain all contracts but only those that lessen the carrier's liability in a manner not authorized by any provision of the Act. In that case the Court of Appeals for the Second Circuit held invalid a *pro rata* valuation clause upon the ground that it lessened the carrier's liability in a manner not authorized by the Act. The Court did not decide that since a *pro rata* clause was not covered by the text of the Act it automatically followed that the clause was prohibited. On the contrary, the Court's decision was that the *pro rata* clause was void because it lessened the carrier's liability as prescribed by the Act. Before it considered

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[8] This statement was quoted with approval by the House Committee on Merchant Marine and Fisheries (House of Representatives Report No. 2218, 74th Cong. 2nd Sess., dated April 23, 1936, at p. 4).

whether the clause was invalid, the Court first determined that the Act expressly contained a provision with respect to measuring the carrier's liability. The Court then resolved that the *pro rata* clause measured the carrier's liability contrary to that provision of the Act. That being so, "to give effect to the *pro rata* clause would 'lessen' the carrier's liability in a manner not authorized by any provision of 'this chapter' " (156 F. (2) at p. 605). See also concurring opinion of Judge Chase in *Balfour, Guthrie & Co. v. American-West African Line*, 136 F. 2d 320 at p. 323 (2d Cir., 1943); *Scarburgh v. Compania Sud-Americana De Vapores*, 174 F. 2d 423 (2d Cir., 1949); *The Vermont*, 47 F. Supp. 877, 879 (E. D. N. Y. 1942).

a. *Congress never intended to preclude the parties from contracting between themselves to alter the indirect results of the Chattahoochee decision.*

The Both-to-Blame Clause is of significance only in suits in the United States, because only in the United States has cargo, in a mutual fault collision, been permitted to recover the full amount of its damages from the non-carrying vessel. Other maritime nations, including Great Britain, Canada, Mexico, Brazil, Argentina, Uruguay, and the nations throughout Europe, have adopted the rule of the Collision Convention of 1910, which restricts the recovery of cargo owners in proportion to the fault of the non-carrying vessel. *Knauth, The American Law of Ocean Bills of Lading* (3d ed. 1947) 176.

The Senate Committee on Foreign Relations, when in 1939 it considered ratification of the Collision Convention of 1910, denounced the indirect result of the rule of *The Chattahoochee* as contrary to the public policy stated in both the Harter Act and the Carriage of Goods by Sea Act. Similar statements are contained in the report of Secretary

of State Hull, which was concurred in by the late President Franklin D. Roosevelt. These may be found in 1939 A. M. C. 1051, *et seq.* The Senate Committee said (1939 A. M. C. at pp. 1055-1056):

> "As noted above, *in one important respect the policy underlying the Harter Act has never, in fact, become effective in the courts of the United States.* The decision of the Supreme Court in the *Chattahoochee case* allows the owners of cargo damaged or lost in collisions, where both ships are to blame, to sue the noncarrying vessel for the entire cargo damage; but, pursuant to the doctrine of contribution of admiralty law, permits the noncarrying vessel to collect from the carrying vessel one-half of the damage which the former was required to pay. In other words, although the Harter Act prevents the cargo owners from recovering directly from the carrying vessel when at the beginning of the voyage that vessel was seaworthy, properly manned and equipped, and the cargo properly stowed, that vessel may be compelled eventually, in the case of a both-to-blame collision, to pay half of the damage sustained by its own cargo regardless of the degree of fault of the vessel." (Italics ours).

Concededly, the statements by our Executive and Legislative departments were made after the passage of the Carriage of Goods by Sea Act and in conjunction with a Convention that was not ratified. But they are none the less of significance for they serve to corroborate the fact that the indirect result of the rule of *The Chattahoochee* have not been favorably received, and that the anomalous situation which it has caused is in need of correction.

It is one thing to say that Congress has not affrmatively acted to remedy that situation apart from what the parties may have contracted. It is another thing to contend that,

with knowledge of its existence, Congress deliberately precluded the parties from contracting between themselves to correct it.

The District Court agreed that the Both-to-Blame Clause

> ". . . corrects the anomalous result of the operation of the *Chattahoochee* and *Atlas* rules which led shipowners 'to adopt extraordinary precautions to avoid being sued in the United States and has also given rise to some remarkable efforts to gain the advantage of the American Rule.' Knauth, Ocean Bills of Lading, 176 (3d ed. 1947), see 176-7 for illustration" (R. 113).

It is contended that the failure of the Senate to ratify the Collision Convention of 1910 indicates that it was content to let the indirect results of *The Chattahoochee* remain and that therefore the Both-to-Blame Clause is invalid. This, however, is clearly a *non sequitur*.

Concededly, the Collision Convention of 1910 would have changed in part, by operation of law and without the necessity of contract, the direct as well as the indirect results of *The Chattahoochee* decision by providing that damage to cargo should be borne by the vessels at fault, without joint or several liabilities towards the third parties (Article 4). Under the convention, assuming an equal fault collision, cargo would recover only fifty percent from the non-carrying vessel, and it could not recover the other fifty percent of its damages from the carrier because of the Carriage of Goods by Sea Act's exemption to the carrier from responsibility for negligent navigation. Thus, cargo would collect only 50% of its damage from the non-carrying vessel.

In so far as the relationship between cargo owner and carrier is concerned, this is the practical result of the Both-to-Blame Clause.

The Collision Convention of 1910 went much further. Among other things, it adopted the rule of proportional fault, as distinguished from half damages in both-to-blame collisions. This latter provision was objectionable to various interests.

Moreover, there are numerous reasons apart from rights of cargo which indicate why the Senate has not ratified the Collision Convention.[10]

Clearly, the failure to ratify the Collision Convention is no indication that the Senate intended that any contract remedying the anomalous situation indirectly produced by the *Chattahoochee* decision should be invalid. As long as

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[10] One of the most important is that it affected the rights of passengers and crews and was objectionable to the labor unions. See brief filed on behalf of National Organization of Masters, Mates and Pilots of America, Hearings before Subcommittee of the Committee on Foreign Relations, 75th Cong. 3rd Sess. (1938) at p. 439. In addition, the Collision Convention only affected collisions between foreign vessels or between an American vessel and a foreign vessel, and did not change the basic American law with respect to collisions between two American vessels. It, therefore, left American vessels subject to a different law with respect to collisions from the law applicable to foreign vessels, thereby adding to a lack of uniformity. See statement on behalf of the American Steamship Owners' Association of New York, Hearings before Subcommittee of the Committee on Foreign Relations, 75th Cong., 3rd Sess. (1938) at p. 176.

Furthermore, the commercial interests strenuously objected to our domestic law respecting collisions being modified by a Treaty and not in the usual way by an Act passed by both Houses of Congress. See letter of the Maritime Association of the Port of New York, dated January 10, 1938, Hearings before Subcommittee of the Committee on Foreign Relations, 75th Cong., 3rd Sess. (1938) at p. 439.

The Treaty was also objected to because it changed the rule laid down by the Supreme Court in *The Pennsylvania*, 19 Wall. 125 (1873). One of the main groups of objectors was the American steamship owners.

The trouble with the Treaty was that it covered a multitude of controversial and domestic features and attempted to have them enacted into law by means of a Treaty instead of by usual Congressional action before both Houses. Even the Brussels Convention of 1924 dealing with The Hague Rules was not formally ratified until the Carriage of Goods by Sea Act became law.

that rule prevails, the only recourse of a shipowner is to seek relief by contractual provision. The failure of the Senate to ratify the Collision Convention indicates, at the best, that it has not disturbed the indirect results of the rule of *The Chattahoochee*, namely, that under similar provisions of the Harter Act, which are not self-executing, a carrier, *in the absence of contract*, may be held indirectly responsible to the cargo owner because of the right of the non-carrying vessel to recoup the damages which the latter pays to the cargo owner.

b. *Congress not only failed to use language which can reasonably be construed to invalidate the Clause, but, in fact, it failed to adopt the proposed Englar amendment to the Act which would have explicitly prohibited the Clause. That action of Congress must be regarded as a deliberate refusal to invalidate the Clause.*

In the Hearings before the Commerce Committee (74th Congress, 1st Session, May 10, 1935, S. 1152), Mr. Englar on behalf of the cargo underwriting interests specifically requested that §4(3) of the Act be amended so as to read:

> "The shipper *or owner of the goods* shall not be responsible for loss or damage sustained, *or liability therefor incurred*, by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants. *Any clause or stipulation which seeks to impose liability contrary to the foregoing shall be null and void, including any clause or stipulation requiring the owner of cargo to indemnify the ship or carrier against liability to a colliding vessel for any part of the collision damages paid or payable by such colliding vessel.*" (Suggested new matter by Mr. Englar in italics).

Congress, while it amended the Bill in other respects,[11] refused to adopt the Englar amendment.

Congress held extended Hearings dealing with the Englar amendment where numerous persons representing the cargo owners' as well as the shipowners' interests appeared and testified. Discussions were had with reference to the Englar amendment before the Senate as well as the House of Representatives. (Hearings Before Commerce Committee 74th Cong. 1st Sess., S. 1152 (1935), 52-55, 61 *et seq.*, Hearing Before Committee on Merchant Marine and Fisheries, 74th Cong. 2nd Sess., S. 1151 (1936) 49-50; 63-65; 87). The entire circumstances surrounding the use of the Clause were revealed to Congress and it was made aware of the anomalous situation indirectly produced by the *Chattahoochee* decision. The arguments of the cargo underwriters against the use of the Clause were also presented to Congress.

If Congress had intended to prohibit a Both-to-Blame Clause, it would have been very simple to have so provided in the Act. The question was directly presented to Congress by the proposed Englar amendment, which was not accepted. The fact that Congress did not so provide is convincing evidence that it did not intend to prohibit such

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[11] In a memorandum prepared by the Department of State on June 5, 1937 (51 Stat. 269) the amendments to the Act are discussed and are compared with the text of the Act as approved by the Convention. This may be found in Appendix H of *Knauth, The American Law of Ocean Bills of Lading*, (3d ed. 1947) 270. The amendments made by Congress were not intended to conflict with the provisions of the Convention. This is clearly indicated by the correspondence between the United States Department and the Italian Government, in which the State Department said: "It was the intention of this Government that the Carriage of Goods by Sea Act should bring the American statute law as to ocean bills of lading into accord with the Brussels convention and that it should not contain any provisions that would interfere with substantial compliance with the provisions of the convention on the part of the United States." See Knauth, *supra*, pp. 277-278.

Clauses, particularly having in mind the long approved practice of using Both-to-Blame Clauses and the fact that the cargo underwriters specifically requested that such Clauses be prohibited.[12]

It is well settled that the failure of Congress to adopt a proposed amendment is a circumstance which may be considered in construing the legislative intent as not embracing the scope of the language rejected. This was forcibly expressed in *Pennsylvania R. R. Co.* v. *International Coal Co.*, 230 U. S. 184 (1912),[13] at p. 198:

> "The fact that this provision measuring the amount of recovery by rebate was omitted from the Act, as finally reported to both Houses and passed, is not only significant, but so conclusive against the contention of the plaintiff that it quotes—not the report of the conference committee—but a statement, made by a member of the Senate Conference Committee, to support the present argument that §8 means the same thing as the omitted clause."

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[12] In 23 Virginia Law Review (1937) at pages 595-596, f.n. 28, it is said: "Section 4(3) exempts the *shipper* from liability for 'loss or damage sustained by the carrier or the ship arising or resulting from any cause without the *act, fault* or *neglect* of the shipper, his agents, or his servants'. (Italics supplied.) A controversy arose in connection with this section while the Act was pending before Congress, the point in dispute being its applicability to 'both-to-blame collision clauses' introduced by shipowners into bills of lading as a result of the decisions of the United States Supreme Court in *The Chattahoochee*, 173 U. S. 540 (1899) and *Aktieselskabet Cuzco* v. *The Sucaresco*, 294 U. S. 394 (1935).

The conclusion seems to have been that the section does not affect the legality of such clauses in bills of lading. See Statement of W. J. Nunnally, Jr., in *Hearing before Committee on Merchant Marine and Fisheries on S. 1152*, 74th Cong., 2d Sess. (1936) 49-53; Statement of Ira A. Campbell, *id.* 53-59, 63-65; Statement of Arnold W. Knauth, *id.* 87."

[13] See also *Keystone Mining Co.* v. *Gray*, 120 F. 2d 1, 10 (3d Cir., 1941); *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. 2d 52, 58 (8th Cir., 1940); *United States* v. *United Shoe Machinery Co.*, 264 Fed. 138 at p. 174 (E. D. Mo., 1920), affirmed 258 U. S. 451.

It is submitted that the failure of Congress to amend the Act so as to specifically prohibit the Clause, establishes that the bill, as enacted, was not intended to prohibit the Clause.

The clauses which Congress determined should be prohibited are specified in §3(8), discussed below. The Both-to-Blame Clause following full discussion was not forbidden.

POINT IV.

SECTION 3(8) OF THE ACT INVALIDATES ONLY THOSE CLAUSES WHICH LESSEN THE CARRIER'S DEFINED LIABILITY "OTHERWISE THAN AS PROVIDED IN THIS CHAPTER". THE BOTH-TO-BLAME CLAUSE BY EXPLICIT TERMS OPERATES ONLY WHERE A COLLISION OCCURS AS A RESULT OF NEGLIGENT NAVIGATION. THE ACT EXPRESSLY RELIEVES THE CARRIER FROM ALL LIABILITY UNDER SUCH CIRCUMSTANCES. SINCE THE CLAUSE APPLIES ONLY WHERE THE CARRIER IS NOT LIABLE, IT DOES NOT FALL WITHIN THE PROHIBITION OF THE SECTION.

The agreements which are invalidated by §3(8)[15] are those which reduce the obligations of the carrier to the cargo owner enumerated in that section or which "lessen *such* liability otherwise than as provided by the Act". *The Campfire*, 156 F. 2d 603 (2d Cir., 1946), discussed pp. 22-23, *supra*.

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[15] That section provides:

"Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening *such liability* otherwise than as provided in this chapter, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability." (Italics ours).

In *Scarburgh* v. *Campania Sud-Americana De Vapores*, 174 F. 2d 423 (2d Cir., 1949) the history of the Carriage of Goods by Sea Act was reviewed and it was stated once more that the only clauses which the Act prohibits are those which lessen the carrier's defined liability to the cargo owner. At page 424 it was said:

> "The Carriage of Goods by Sea Act of 1936 • • • expresses our adherence to the Brussels Convention of 1924, embodying substantially the provisions of the earlier Harter Act of 1893 • • •. The purpose of the Act was to carry over into the international sphere the uniformity achieved for American voyages in the Harter Act by mitigating the common-law 'insurer's' liability of carriers, *in exchange for a prohibition of clauses in the contract of carriage lessening the carriers' liability.* • • •" (Italics ours).

Since the Both-to-Blame Clause applies only where there is no liability by the carrier to the cargo owner, the Clause is not one "lessening such liability otherwise than as provided in this chapter." The District Court's opinion makes this clear (R. 107-108).

By its own terms, the Clause applies only where a collision occurs as a result "of any act, neglect or default of the Master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship." That language is verbatim with the wording of §4-2a of the Carriage of Goods by Sea Act which exonerates the carrier from liability for loss or damage occurring under those circumstances. It is in those instances alone where the Act itself completely exonerates the carrier that the Clause operates.

A Both-to-Blame Clause, therefore, cannot be deemed within the prohibition of §3(8). In that respect §3(8) is

clear, because it speaks of lessening the carrier's defined liability "otherwise than as provided in this chapter." The chapter expressly relieves the carrier from liability to the cargo owner because of negligent navigation. Insasmuch as the carrier is not liable, surely there can be no "lessening" of this non-existent liability.

POINT V.

THE BOTH-TO-BLAME CLAUSE IN NO WAY CONFLICTS WITH THAT PORTION OF §3(8) OF THE ACT WHICH PROHIBITS USAGE OF "BENEFIT OF INSURANCE" OR SIMILAR CLAUSES.

The prohibition against "benefit of insurance" clauses does not invalidate a Both-to-Blame Clause, for a Both-to-Blame Clause is not similar to a "benefit of insurance" clause. This District Court so held (R. 108-109).

The only purpose of a "benefit of insurance" clause was to enable a carrier, who had been guilty of a breach of one of its essential duties, to claim any insurance which the cargo owner had effected. In other words, a "benefit of insurance" clause enabled the carrier to escape all liability to the cargo owner, including liability because the vessel was unseaworthy or because the shipowner had failed to exercise due diligence in manning the vessel or because the shipowner failed to load, carry, or deliver the cargo properly.

This "benefit of insurance" clause provided:

> "In case of any loss, detriment, or damage done to or sustained by said goods or any part thereof for which the carrier shall be liable to the shipper, owner, or consignee, the carrier shall to the extent of such liability have the full benefit of any insur-

ance that may have been effected upon or on account of said goods."

This clause was held valid even before the Harter Act. *Phoenix Insurance Co.* v. *Erie and Western Trans. Co.*, 117 U. S. 312 (1886). Since most cargo owners insure their cargoes against risks which include the carrier's negligence in performing its essential duties, the effect of the clause was that the carrier would be reimbursed by the underwriters for any payments made by it where the cargo had been damaged because of the negligence of the carrier in performing its essential duties and for which the carrier was directly responsible to the cargo owner. To overcome this, the underwriters would insert a provision in their policies relieving them from such risks where bills of lading contained benefit of insurance clauses. They adopted the practice of making payment to the cargo owners under a "loan receipt". This arrangement was held by the Supreme Court not to constitute "payment of insurance", so that the carrier was not entitled to the benefit of it. *Luckenbach* v. *McCahan Sugar Co.*, 248 U. S. 139 (1918). The practical effect of this decision was to destroy the clause, for its use thereafter was valueless.

It is contended that if the Act condemns a comparatively harmless benefit of insurance clause which would relieve the carrier from his liability to the cargo owner for negligent damage to cargo, then the Both-to-Blame Clause must also be condemned. This is another illustration of the cargo owners' failure to understand that the Harter Act and the Carriage of Goods By Sea Act "undoubtedly modify the public policy as previously declared by the courts" (*The Irrawaddy*, 171 U. S. 187, 193, *supra*), in that by operation of law they relieve the carrier from its liability to the cargo owner for damage to cargo

caused by negligent navigation or management, which are the only circumstances in which the Both-to-Blame Clause operates.[16]

There is no resemblance between a Both-to-Blame Clause and a "benefit of insurance" clause. A "benefit of insurance" clause operates only where the carrier is directly liable to the cargo owner and, thus, it would affect the essential duties imposed by the Act upon the carrier. On the other hand, a Both-to-Blame Clause operates only in those instances where the carrier is not liable to the cargo owner and, thus, it in no way affects the essential duties imposed by the Act upon the carrier.

POINT VI.

SECTION 4(3), 46 U. S. C. A. §1304(3), WHICH PROVIDES THAT A SHIPPER IS NOT RESPONSIBLE FOR LOSS OR DAMAGE SUSTAINED BY A CARRIER OR THE SHIP EXCEPT WHERE CAUSED BY THE ACT, NEGLECT OR FAULT OF THE SHIPPER, CANNOT BE CONSTRUED TO PROHIBIT A BOTH-TO-BLAME CLAUSE.

The anomalous situation resulting from the *Chattahoochee* decision was directly presented to Congress when it enacted the Carriage of Goods by Sea Act. Congress was

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[16] The argument that the Clause requires the cargo owner to become an insurer for the carrier and it is, therefore, unjust because he is required to seek re-insurance, is also without merit. The Clause does not require the cargo owner to make any original payment to the carrier. He has been paid, and one-half or some other portion of that payment ultimately has come from the carrier. Under the Clause the cargo owner merely promises to return to the carrier whatever amount the cargo owner has received from the non-carrying ship which the non-carrying ship has collected from the carrier.

Nor is there any merit to the suggestion that the cargo-owner must resort to re-insurance. Clause 25 of the standard cargo policy covers obligations which the cargo owner may have assumed under a Both-to-Blame Clause, and provides: "Where goods are shipped under a bill of lading containing a so-called 'Both to Blame Collision' Clause these Assurers agree, as to all losses covered by this insurance, to indemnify the Assured for any amount (up to the

also aware that the Both-to-Blame Clause, then in use, overcame by contract the indirect consequences of the *Chattahoochee* decision. Accordingly, it is reasonable to suppose that if Congress had intended to preclude the parties from contracting so as to overcome the indirect results of that decision, it would have used clear and unambiguous language. There is no such language in the Act. The conclusion seems inescapable, especially when it is considered that the proposed Englar amendment explicitly invalidating the Clause was not accepted by Congress (See pp. 27-30, *supra*), that Congress did not intend to and did not, in fact, prohibit the use of the Clause.

Moreover, if §4(3) of the Carriage of Goods by Sea Act is held to vitiate the Both-to-Blame Clause, then a further anomalous situation will result, since §4(3) is not contained in the Harter Act. It must be remembered that the provisions of the Harter Act remain controlling with respect to non-foreign commerce. If Congress had intended to prescribe a different rule with respect to bills of lading in foreign trade, it would seem reasonable that Congress would have expressed itself in clear terms. For this Court to hold that §4(3) invalidates Both-to-Blame Clauses would result in the Court's announcing a rule which would not be applicable to the bills of lading controlled by the Harter Act. Both-to-Blame Clauses in bills of lading controlled by the Harter Act would be valid while Both-to-Blame Clauses contained in bills of lading controlled by the provisions of the Carriage of Goods by Sea Act would be invalid. Certainly, if such inconsistent rules were meant to be prescribed by Congress, it would have said so in clear language. It did not do so.

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amount insured) which the Assured may be legally bound to pay to the shipowners under such clause. In the event that such liability is asserted the Assured agree to notify the Assurers who shall have the right, at their own cost and expense, to defend the Assured against such claim."

a. *Section 4(3) is concerned solely with loss or damage suffered by a carrier or ship which is unrelated directly or indirectly to cargo damage.*

To say that the "cargo damage" because it is brought about by a collision, is *transmuted* into "collision damage" is to indulge in nothing more than a play on words.

True, the cargo damage results from the collision. Because of that the cargo owners imply it becomes part of a "collision liability." No Court, however, has ever held that because the cargo damage is recovered from the non-carrying vessel it loses its identity of "cargo damage." While it is an item of damage suffered by the non-carrying vessel because of the collision, the item of damage is none the less a "cargo claim" which the non-carrying vessel has satisfied.

What the non-carrying vessel pays is "cargo damage" resulting from the collision and it is that "cargo damage" which the non-carrying vessel recoups from the carrier. There is no physical *transmutation* of the "cargo damage" into "collision damage" because the liability which is imposed results from the collision. The non-carrying vessel does not claim its payment as a hull loss or as any loss other than a loss suffered because of its payment of "cargo damage."

The Court of Appeals in its opinion (R. 143) recognized that the divided damage rule results in the cargo owner "indirectly" recovering a portion of his loss from the carrier.[17]

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[17] This is in accord with the decision of this Court in *Great Lakes Corp.* v. *S. S. Co.*, 301 U. S. 646 (1937), and with the prior decisions of the Court of Appeals for the Second Circuit. In *The Cockatoo*, 61 F. 2d 889 (2d Cir., 1932), it was said at p. 892: "In reason it can make no difference whether the noncarrying vessel recoups itself out of money due from the carrying vessel as was done in The Chattahoochee or recovers the amount of contribution affirma-

Clearly, the subject matter of the loss or damage covered by the Both-to-Blame Clause relates to damage *to* cargo. Section 4(3) does not deal with damage *to* cargo. That section deals with damage *by* cargo. Loss or damage to cargo is covered specifically in words of one syllable by §4(2), and provides that the carrying ship shall not be responsible for this loss or damage. Section 4(3) in no way supplements §4(2) but is concerned solely with loss or damage suffered by a carrier or vessel which is unrelated, directly or indirectly, to damage to cargo.

b. Section 4(3) applies only to loss or damage caused by cargo and was intended merely to re-state existing law that where a ship had been damaged by cargo, the responsibility for the damage and loss cannot be imputed to the shipper without some dereliction of duty on his part.

Section 4 (3) merely re-states existing law that a shipper generally is not liable for loss or damage caused by its cargo without some act, neglect or fault on its part, while other provisions of the Act make exceptions to that general rule.

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tively as in Erie R. R. Co. *v.* Erie Transportation Co. In either case the property of the noncarrying vessel is used to liquidate one-half the claim of the cargo, and *by either mode of satisfying the claim the carrying vessel is subjected (whether directly or not) to liability for one-half the damages suffered by the cargo.*" (Italics ours).

In *New York & Cuba Mail S. S. Co.* v. *Amer. S. S. O. Mut. P. & I. Ass'n*, 72 F. 2d 694 (2d Cir., 1934), the Court, in construing a policy of marine insurance, held that a carrier in a mutual fault collision case, charged with an item of cargo damage by the noncarrying ship, suffered a loss "in respect to cargo". While it was held that the carrying vessel, *The Mexico*, did not suffer a "liability" unless in the final adjustment of accounts it would be obliged to make a payment to the non-carrying ship, the decision recognized that the carrier had sustained "a loss in respect to cargo." At p. 697, the Court, referring to the carrier, said: "Now the owners of The Mexico have sustained a loss in respect of its cargo. * * *".

While the purpose of the Hague Rules of 1921 on which the Carriage of Goods by Sea Act is founded was to unify *certain* rules relating to bills of lading, it was not intended that existing Anglo-American law was to be altered in all respects.

A cargo owner's lack of responsibility to his carrier or to others for loss or damage caused by his cargo except where there has been some dereliction of duty on his part is basic Anglo-American law. Cf. *The Victor* (1860) 2 *Law Times* 331, cited with approval in *The Atlas*, 93 U. S. 302, 311 (1876). Section 4(3) intended merely to re-state this general law. This is demonstrated by an absence from the historical record surrounding the Hague Rules of any indication that an existing evil was intended to be remedied by this section. These reports contain nothing to indicate that §4(3) was intended to do anything but express the existing Anglo-American law.

That §4(3) was not intended to grant new rights is further evidenced by the wording of the section, which absolves merely the shipper from responsibility and does not include the consignee or others who may actually own the cargo. If new rights were intended, what possible reason would there have been to restrict them to the shipper? Undoubtedly the word *shipper* was used without objection because the section created no new rights but merely re-stated the existing Anglo-American law which imposed no responsibility upon the owner of cargo—shipper, consignee or otherwise—for loss caused by cargo without some fault upon the part of the cargo owner.

In summary, §4(3) applies only to loss or damage caused *by* cargo. It does not cover damage *to* cargo. If, because of the cargo, the ship suffers damage or the carrier suffers loss because of damage to other cargo, then the shipper

shall not be responsible, except when the shipper's act, fault or neglect contributed to the loss or damage.

The cargo owner having collected, by indirection, from the carrying ship fifty percent or other portion of the loss or damage to its cargo in circumstances where the carrying ship is by statute immune from liability, the question in its final analysis is reduced to whether the cargo owner, in the face of an agreement to the contrary, may keep in its pocket that part of the loss or damage to its cargo which it has succeeded by indirection in collecting from the carrying ship. We submit that the Clause, which implements the legislative policy that carriers should not and that cargo owners should bear the risk of damage to cargo due to the carrier's negligent navigation by its servants, is valid, and that §4(3) does not relieve the cargo owner from its contract to repay this item of cargo damage, because §4(3) is not concerned with a loss relating to cargo damage.

CONCLUSION.

FOR THE FOREGOING REASONS, THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE REVERSED.

Respectfully submitted,

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